AmBank (M) Bhd v Mujur Zaman Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S2–24–1218 OF 2006
AZIAH ALI J
10 DECEMBER 2007

Civil Procedure — Appeal — Stay of execution — Auction of defendants' lands — Whether lands were of substantial value — Whether lands subject matter of dispute — Whether serious and irreparable damage should land be sold — Whether appeal would be rendered nugatory — Whether substratum of defendants' appeal would be destroyed — Whether special circumstances shown — Whether stay of execution warranted

The plaintiff filed an originating summons for an order for sale of three parcels of land ('the said lands') by way of auction under ss 256 and 257 of the National Land Code to recover sums due under a facilities agreement. On 29 May 2007, the order for sale was granted. The defendants then filed an appeal to the Court of Appeal against the said order. Pursuant to the appeal the defendants filed an application for a stay of all proceedings pending the disposal of their appeal. The defendants submitted that if stay was not granted and the plaintiff proceeded with the sale of the said lands before their appeal was heard then it would be impossible for the defendants to recover the said lands and in the event the appeal was successful, it appeal would be rendered nugatory. It was the defendants' argument that if stay was not granted, the substratum of the appeal would be destroyed as the said lands were the subject matter of dispute between the parties. The defendants further submitted that they would suffer serious and irreparable damage which might not be adequately compensated by damages if the lands were sold off as there were big differences in opinion in the valuation of the lands by the parties and these lands were of substantial value. The plaintiff, in objecting to the application, submitted that an appeal was not automatically a stay. The plaintiff submitted that the defendants bore the burden of establishing special circumstances and that the defendants had failed to do so. The plaintiff also argued that even if the land was auctioned off to a third party, the damages were quantifiable and the plaintiff had the capacity to pay the defendants.

Held, allowing the application with costs in the cause:

(1) The facts showed that the plaintiff did not deny that it was taking steps

to auction off the said lands because at the date of the hearing of this application, the plaintiff had initiated proceedings with a summons for directions and had obtained an auction date. Thus, the court was not precluded from taking into consideration the value of the said lands that was the subject matter of this instant application (see paras 10–11).

(2) If a stay was not granted there was a real likelihood that the plaintiff would proceed with the auction of the defendants' lands. Thus the defendants might lose the said lands even before the disposal of their appeal and the appeal would therefore be rendered nugatory (see para 12); *RHB Sakura Merchant Bankers Bhd v Tan Sri Dato' Ting Pek Khiing (No 2)* [2004] 2 MLJ 315 referred.

(3) Further if the said lands were sold off, this would defeat the substratum of the defendants' appeal as the said lands were the subject matter of the disputes between the parties. Thus, if stay was not granted the defendants would sustain serious and irreparable damage as the loss of the said lands may be irrecoverable (see paras 13–14).

(4) Further, the loss of the said lands might not be adequately compensated by damages even though the plaintiff might have the capacity to pay. The defendants have made it clear that they were not interested in the proceeds of the sale. On the other hand, it was apparent from the plaintiff's actions that the proceeds of sale was their ultimate interest (see para 15).

(5) The plaintiff was merely concerned with the recovery of monies due to them and in any case the plaintiff was secured. In the event the appeal was unsuccessful, the plaintiff could proceed with the sale of the lands. Thus in the interest of justice the status quo should be preserved pending the outcome of the defendants' appeal. On the facts, the defendants had shown special circumstances in support of their application (see paras 16–17).

[Bahasa Malaysia summary

Plaintif telah memfailkan satu saman pemula untuk satu perintah jualan tiga bidang tanah ('tanah-tanah tersebut') melalui lelongan di bawah ss 256 dan 257 Kanun Tanah Negara untuk mendapat kembali jumlah yang dihutang di bawah satu perjanjian kemudahan. Pada 29 Mei 2007, satu perintah jualan diberikan. Defendan-defendan kemudiannya telah memfailkan satu rayuan ke Mahkamah Rayuan terhadap perintah tersebut. Berikutan rayuan tersebut defendan-defendan telah memfailkan satu permohonan untuk satu penggantungan semua prosiding sementara menunggu penyelesaian rayuan mereka. Defendan-defendan berhujah bahawa sekiranya penggantungan tidak diberikan dan plaintif terus dengan penjualan tanah-tanah tersebut

sebelum rayuan mereka dapat didengar, maka mustahil untuk defendan-defendan mendapat kembali tanah-tanah tersebut dan sekiranya rayuan tersebut berjaya, rayuan tersebut akan menjadi tidak berguna. Ia adalah hujahan defendan-defendan bahawa sekiranya satu penggantungan tidak diberikan, substratum rayuan tersebut akan dihapuskan oleh kerana tanah-tanah tersebut adalah perkara pertikaian di antara pihak-pihak. Defendan-defendan juga menegaskan bahawa mereka akan mengalami kerugian serius yang tidak boleh dipampas yang berkemungkinan tidak dapat dipampas secukupnya dengan ganti rugi sekiranya tanah-tanah tersebut dijual oleh kerana terdapat perbezaan pendapat yang besar pada penilaian tanah-tanah tersebut oleh pihak-pihak dan tanah-tanah ini adalah besar nilainya. Plaintif, dalam membantah permohonan tersebut, berhujah bahawa rayuan bukan secara automatik menjadi satu penggantungan. Plaintif berhujah bahawa defendan-defendan mempunyai beban membuktikan keadaan khas dan defendan-defendan telah gagal berbuat demikian. Plaintif juga berhujah bahawa walaupun tanah-tanah tersebut telah dilelongkan kepada pihak ketiga, ganti rugi dapat ditetapkan dan plaintif mempunyai keupayaan membayar defendan-defendan.

Diputuskan, membenarkan permohonan dengan kos dalam kausa:

(1) Fakta menunjukkan bahawa plaintif tidak menafikan bahawa ia mengambil langkah untuk melelong tanah-tanah tersebut kerana pada tarikh pendengaran permohonan, plaintif memulakan prosiding untuk saman untuk arahan dan telah memperolehi tarikh lelong. Mahkamah oleh itu tidak dikecualikan daripada mempertimbangkan bahawa nilai tanah-tanah tersebut adalah perkara permohonan ini (lihat perenggan 10–11).

(2) Sekiranya satu penggantungan tidak diberikan terdapat kemungkinan besar bahawa plaintif-plaintif akan terus dengan lelongan tanah-tanah defendan. Dengan itu defendan-defendan berkemungkinan akan kehilangan tanah-tanah tersebut sebelum penyelesaian rayuan mereka dan oleh itu rayuan akan menjadi tidak berguna (lihat perenggan 12); *RHB Sakura Merchant Bankers Bhd v Tan Sri Dato' Ting Pek Khiing (No 2)* [2004] 2 MLJ 315 dirujuk.

(3) Selanjutnya, jika tanah-tanah tersebut dijual oleh plaintif, ini akan menggagalkan substratum rayuan defendan-defendan kerana tanah-tanah tersebut adalah perkara pertikaian di antara kedua-dua pihak. Oleh itu, jika penggantungan tidak diberikan, defendan-defendan akan mengalami kerugian yang serius dan tidak boleh dibaiki kerana kerugian tanah-tanah tersebut mungkin tidak dapat ditebus (lihat perenggan 13–14).

(4) Selanjutnya, kehilangan tanah-tanah tersebut berkemungkinan tidak dapat dipampas dengan secukupnya melalui gantirugi walaupun plaintif berkemungkinan mempunyai keupayaan berbuat demikian. Defendan-defendan telah menjelaskan ia tidak mementingkan hasil jualan tersebut. Sementara ia adalah jelas daripada tindakan-tindakan plaintif bahawa hasil jualan adalah kepentingan utama mereka (lihat perenggan 15).

(5) Plaintif hanya berminat untuk mendapatkan kembali wang yang kena dibayar kepada mereka dan walau bagaimanapun plaintif adalah terjamin. Jika rayuan tidak berjaya plaintif boleh meneruskan dengan jualan tanah-tanah tersebut. Oleh itu, untuk kepentingan keadilan status quo patut dikekalkan sementara menunggu keputusan rayuan defendan-defendan. Atas fakta, defendan-defendan telah menunjukkan keadaan khas di dalam menyokong permohonan mereka (lihat perenggan 16–17).]

Notes

For cases on stay of execution, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1489–1497.

Cases referred to

Arumugam a/l Ponusamy v Karupiah a/l Ramasamy & Ors [2001] MLJU 602 (refd)

Institut Teknologi Federal Sdn Bhd v IIUM Education Sdn Bhd [2005] 3 MLJ 221 (folld)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257 (refd)

Perwira Affin Bank Bhd v KI Production Sdn Bhd [2000] 4 MLJ 652 (folld)

RHB Sakura Merchant Bankers Bhd v Tan Sri Dato' Ting Pek Khiing (No 2) [2004] 2 MLJ 315 (refd)

Tropiland Sdn Bhd v DCB Bank Bhd & Ors [2000] 2 MLJ 65 (refd)

Legislation referred to

National Land Code ss 256, 257

J Kannaperan (Shearn Delamore & Co) for the plaintiff.
Rajan Navaratnam (Rajan Navaratnam) for the defendant.

Aziah Ali J:

[1] On 23 June 2006 the plaintiff filed an originating summons for an order for sale of three parcels of land known as HS(D) 5460 PT No 9135, HS(D) 5472 PT No 9147 and HS(D) 5473 PT No 9148, all in Mukim Ijok, Kuala Selangor, by way of auction under ss 256 and 257 of the National Land

Code to recover sums due under a facilities agreement. On 29 May 2007, the order for sale was granted. The defendants then filed an appeal to the Court of Appeal against the said order. Pursuant to the appeal the defendants filed an application vide encl 18 for a stay of all proceedings pending the disposal of their appeal. I had allowed the defendants' application and the plaintiff now appeals against this decision.

[2] In support of the defendants' application, learned counsel for the defendants submitted that the defendants have established special circumstances to justify the grant of a stay. Counsel referred to the case of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 where Augustine Paul JCA (as he then was) in delivering the decision of the court had said, inter alia, as follows:

> The general rule is that an appeal shall not operate as a stay of execution unless the court so orders. Accordingly, as Brown J said in *Serangoon Garden Estate Ltd v Ang Keng* [1953] MLJ 116 while commenting on the discretion to grant a stay:
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> > But it is a clear principle that the court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it.
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> The need to prove special circumstances before a stay of execution can be granted is English common law that has been adopted in this country.
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> It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. In other words special circumstances is the genus of which nugatoriness is a species. If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special circumstance has been established. Thus they cannot be treated as separate heads and one cannot be an alternative to the other. Neither can one be accepted or rejected in favour of the other as they are inter-related.
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> The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. The reasons must relate to the enforcement of the judgment. They must be deposed in the affidavit filed in support of the application.

[3] In the case of *Institut Teknologi Federal Sdn Bhd v IIUM Education Sdn Bhd* [2005] 3 MLJ 221, Abdul Malik Ishak J (as he then was) said as follows:

> *Kosma Palm Oil* was a decision of the Federal Court. It has resolved the conflicting line of authorities preceding it. It confirms the test of 'special circumstances' and it states that the 'nugatoriness' of an appeal is a species of the 'special circumstances' test and not a separate test by itself. So, if the defendant here was able to show that a refusal of the stay would render any further successful appeal nugatory, this would certainly constitute 'special circumstances'.

His Lordship said further:

In *RHB Sakura Merchant Bankers Bhd v Tan Sri Dato' Ting Pek Khiing (No 2)*, I had this to say at p 318 of the report:

> The emphasis of the nugatory test for determining the stay is not that the appeal would be successful. Rather, a stay is to be granted only if it can be shown that the appeal would be rendered nugatory if it would deprive the defendant of the result of the appeal (*Mohamed Mustafa v Kandasami (No 2)* [1979] 2 MLJ 126).

[4] Learned counsel submitted that if stay is not granted and the plaintiff proceeds with the sale of these three parcels of land before their appeal is heard then it will be impossible for the defendants to recover the three parcels of land and in the event the appeal is successful the appeal will be rendered nugatory.

[5] The defendants' counsel further submitted that the stay itself would give meaningful purpose for the appeal. It is the defendants' argument that if stay is not granted, the substratum of the appeal would be destroyed as these lands are the subject matter of dispute between the parties.

[6] The defendants further contend that they will suffer serious and irreparable damage which may not be adequately compensated by damages if the lands are sold off as there are big differences in opinion in the valuation of the lands by the parties. These lands are agricultural lands of substantial value, a fact conceded to by the plaintiff's counsel. Learned counsel for the defendants submitted that the plaintiff is a secured creditor by way of the charge on the three parcels of land and that the sum due to the plaintiff is quantifiable. In support of his argument counsel referred to the case of *Arumugam a/l Ponusamy v Karupiah a/l Ramasamy & Ors* [2001] MLJU 602; [2002] 1 CLJ 124 where Arifin Zakaria J (as he then was) considered 'serious or irreparable' damage in granting a stay.

[7] In objecting to the application, counsel for the plaintiff submitted that an appeal is not automatically a stay. Learned counsel submitted that the defendants bear the burden to establish special circumstances and that the defendants had failed to do so. Therefore to grant a stay in the absence of special circumstances is contrary to provisions and rules of court.

[8] The plaintiff's counsel submitted that the defendants' concern that if stay is not granted then there is a risk of the land being auctioned are circumstances that apply to all foreclosure proceedings. Learned counsel submitted that just because the subject matter involves land does not mean

that stay must be granted. According to counsel, if this is the position taken by the defendants, then it will defeat the purpose of an order for sale.

[9] Counsel further argued that even if the land is auctioned off to a third party, the damages are quantifiable and the plaintiff has the capacity to pay the defendants. She referred to the case of *Tropiland Sdn Bhd v DCB Bank Bhd & Ors* [2000] 2 MLJ 65 at p 68 where the Court of Appeal dismissed an application for stay as no irreparable harm would befall the plaintiff and the damage is quantifiable.

[10] In my consideration of the defendants' application I take note that the facts show that at the date of the hearing of this application the plaintiff has initiated proceedings with a summons for directions and has obtained an auction date. The plaintiff's counsel has not denied that the plaintiff is taking steps to auction off the three parcels of land.

[11] I accept that these three parcels of land are of substantial value. On the issue of the value of the lands I refer to the case of *Perwira Affin Bank Bhd v KI Production Sdn Bhd* [2000] 4 MLJ 652 where Kamalanathan Ratnam J, said (at p 654):

> In *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633 Edgar Joseph Jr SCJ (sitting as a High Court judge) held that '*land is always deemed to have a special value of loss which may not be adequately compensated by damages*'. Again, whilst this time sitting in the Federal Court the same learned judge said in *Tan Sri Khoo Teck Puat v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 at p 792:
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> > … not forgetting that *the land is always deemed in law to have a special value and is in the nature of things, absolutely limited*…
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> Therefore there is no doubt that the Federal Court has expressed its view that land has 'a special value of loss which may not be adequately compensated by damages'. On this ground I am convinced that the defendant's application ought to be seriously considered by this court… *That land has a special value, is a matter that ought to be considered in all matters including foreclosure proceedings*. (Emphasis added.)

Therefore based on the above authority I am of the opinion that I am not precluded from taking into consideration the value of these three parcels of land that is the subject matter of this application.

[12] On the issue of nugatoriness I am satisfied that in this case if a stay is not granted there is a real likelihood that the plaintiffs will proceed with the auction of the defendants' lands. Thus the defendants may lose these lands even before the disposal of their appeal and the resulting scenario will be, to quote Abdul Malik Ishak J in *RHB Sakura Merchant Bankers Bhd v Tan Sri*

Dato' Ting Pek Khiing (No 2) [2004] 2 MLJ 315, 'the appeal would be rendered nugatory if it would deprive the defendant of the result of the appeal'.

[13] With regard to the defendants' submissions that a refusal of a stay will result in the defeat of the substratum of the defendants' appeal, I refer to the case of *Institut Teknologi Federal Sdn Bhd v IIUM Education Sdn Bhd* where Abdul Malik Ishak J said as follows:

> Now, if the stay is not granted, and the said property wherein FIT stood as well as the licences are legally transferred to MSC, this by itself would defeat the very substratum of the appeal to the Court of Appeal. The key factor that will render any successful appeal nugatory would be the subject matter of the dispute itself … So in my judgment, in the context of encl 11, the only remedy available to the defendant would be to secure the subject matter of the dispute …

Applying what has been said by His Lordship above to the present case, I agree with counsel's submissions that if the three parcels of land are sold off by the plaintiff this will defeat the very substratum of the defendants' appeal as these lands are the subject matter of the dispute between the parties.

[14] On the issue of serious and irreparable damage, again in the above mentioned case Abdul Malik Ishak J said as follows:

> In *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49, the Court of Appeal considered serious or irreparable injury as an example of special circumstances. There the Court of Appeal quoted favourably the decision of Yong J, in the case of *Ajaib Singh v Jeffrey Fernandez* [1971] 1 MLJ 139, in particular the following passage that appeared at p 140 of the *Ajaib Singh*'s case:
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> > After consulting these and other authorities up to the present day, I am of the opinion that an application for stay of proceeding should be made promptly, and it must be proved to the satisfaction of the court that special circumstances exist such as if the stay was not granted, serious or irreparable injury would result to the party applying.

In the present case I agree with the defendants' counsel's submissions that if stay is not granted the defendants will sustain serious and irreparable damage as the loss of these three substantial pieces of lands may be irrecoverable.

[15] I also agree with defendants' counsel that the loss of these lands may not be adequately compensated by damages even though the plaintiff may have the capacity to pay. Whilst the amount owed to the plaintiff is substantial (RM42,690,479.42 outstanding as at 29 May 2007 with daily interest at RM13,041.15) these three parcels of lands are also lands of substantial value. According to the defendants' valuation made in 2001

(which the plaintiff does not agree) the first parcel is valued at RM20.5m with its forced sale value at RM16m, the second parcel was valued at RM53m with a forced sale value of RM42m and the third parcel was valued at RM55m with a forced sale value of RM44m. The defendants have made it clear that they are not interested in the proceeds of sale. On the other hand it is apparent from the actions of the plaintiff that the proceeds of sale is their ultimate interest. In *Arumugam Ponnusamy* at p 131 (CLJ) Arifin Zakaria J said as follows:

> The plaintiff contended that in the event that the land is sold to the third party the plaintiff would suffer irreparable damage which could not be compensated by damages. In the interest of justice I hold that the status quo should therefore be preserved pending the outcome of the appeal even though as contended by the defendants that the plaintiff's interest is ultimately in the proceeds from the sale of the land.

[16] Thus in the above case a stay was granted to preserve the status quo in the interest of justice even though the honourable judge had acknowledged the contention made by the defendant in that case that the plaintiffs interest is ultimately in the proceeds from the sale of the land. In the present case I am of the view that the plaintiff is merely concerned with recovery of monies due to them and in any case the plaintiff is secured. In the event the appeal is unsuccessful the plaintiff can proceed with the sale of the lands. Further I am also of the view that in the interest of justice the status quo should be preserved pending the outcome of the defendants' appeal.

[17] In conclusion I am satisfied that the defendants have shown special circumstances in support of their application. For the above reasons I allowed the defendants' application with costs in the cause.

Application allowed with costs in the cause.

Reported by Sally Kee